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IN THE

Supreme Court of the United States

October Term, 1963.

No. 561.

E. NEWBOLD SMITH,
Petitioner.

v.

COMMONWEALTH OF PENNSYLVANIA,
Respondent.

PETITIONER'S REPLY TO RESPONSE OF COMMONWEALTH OF PENNSYLVANIA.

JOHN B. HANNUM,
PETER HEARN,
PEPPER, HAMILTON AND SCHEETZ,
2001 Fidelity-Philadelphia Trust Bldg.,
Philadelphia, Pennsylvania 19109.
WILLIAM T. COLEMAN, JR.,
ROBERT W. MARIS,
DILWORTH, PAXSON, KALISH,
KOHN & DILKS,
2635 Fidelity-Philadelphia Trust Bldg.,
Philadelphia, Pennsylvania 19109.
THEODORE O. ROGERS,
26 East Market Street,
West Chester, Pennsylvania.
Attorneys for Petitioner.

International, 711 So. 50th St., Phila., Pa. 19143

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The Response filed by the Commonwealth supports one of Petitioner's reasons why certiorari should be granted. The Commonwealth asserts that a federal privilege was properly claimed by the F. B. I. (p. 8)—differing with the Solicitor General who states that a federal privilege was never invoked by the Department of Justice even though the trial court thought it had—and that "in the subsequent denial of petition for subpoena, the trial court had the previous claim of privilege in mind" (p. 7). Petitioner agrees, and has contended throughout, that this is exactly what happened—the trial court refused to issue the subpoena because of its mistaken assumption regarding the proper claim of federal privilege.

The Commonwealth's Response reveals the widely held belief by state prosecutors and state courts that

F. B. I. statements, however relevant, are immune from court process merely upon the assertion of a privilege by the F. B. I. This is the error which only this Court can change by granting certiorari, hearing argument and then reversing. Certainly it would be unfair to force petitioner to spend 27 days in jail[1] and to suffer the stigma of a criminal conviction when everyone now concedes that the Pennsylvania Court rejected petitioner's claim solely on the mistaken notion that the F. B. I. had claimed a federal privilege and that the mere claim thereof foreclosed any inquiry by the trial court.

The Commonwealth's contention that the error was harmless, since petitioner was given two separate and distinct statements taken by the District Attorney at a subsequent time, is clearly without merit. As was pointed out in the Petition for Certiorari (p. 14) and Petitioner's Response to the Memorandum for the United States (p. 4), a contention of "harmless error" is based (1) on Commonwealth speculation that the F. B. I. statements do not contain material helpful to the Petitioner's defense which was not in the District Attorney's statements (neither Petitioner nor the Court has ever seen the F. B. I. statements which admittedly exist) and (2) denies the greater efficacy reasonably expected from statements given to the F. B. I. The statements of the witnesses in the possession of the Commonwealth's District Attorney were taken by the local police from witnesses who later refused to discuss the case with defendant's counsel prior to the trial under circumstances which strongly suggested the witnesses' bias and interest in favor of the Commonwealth. Certainly there is every inference, therefore, that the F. B. I. statements would be much more helpful to the defense.

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1. Commonwealth's Response stating that Petitioner presented a Petition for Parole (p. 2) tends to confuse this point. If certiorari is not granted, the Petitioner must go to jail.

For the reasons stated above, and as set forth in its Petition for Writ of Certiorari, and Response to Memorandum for United States, Petitioner urges that the writ be granted.

Respectfully submitted,

JOHN B. HANNUM,
PETER HEARN,
PEPPER, HAMILTON AND SCHEETZ,
2001 Fidelity-Philadelphia Trust Building,
Philadelphia, Pennsylvania 19109,

WILLIAM T. COLEMAN, JR.,
ROBERT W. MARIS,
DILWORTH, PAXSON, KALISH,
KOHN & DILKS,
2635 Fidelity-Philadelphia Trust Building,
Philadelphia, Pennsylvania 19109,

THEODORE O. ROGERS,
26 East Market Street,
West Chester, Pennsylvania,

Attorneys for Petitioner.

Feb. 25, 1964